BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-128
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	
The Illinois Public Telecommunications Association's Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders.	)	

COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION, AND THE COLORADO PAYPHONE ASSOCIATION IN SUPPORT OF PETITION FOR A DECLARATORY RULING

The Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association ("Associations") support the Illinois Public Telecommunications Association's ("IPTA") petition for a declaratory ruling. IPTA is correct that payphone service providers ("PSPs") are entitled to refunds where regional Bell operating companies ("RBOC") like SBC Illinois and Verizon[1] overcharge PSPs for payphone services under the new services test, and state commissions are preempted from

[1] These comments refer to Verizon as an RBOC because Verizon is the successor to former RBOCs NYNEX and Bell Atlantic as well as non-RBOC GTE and because the Illinois Commerce Commission applied the new services test to Verizon's rates. ICC Order, infra, at 21.

holding otherwise. IPTA is also correct that SBC Illinois and Verizon illegally collected dial around compensation for years without meeting the requirement that they must first set their rates according to the new services test. Long experience shows that state commissions and RBOCs will not implement these FCC requirements unless the FCC demonstrates that it will enforce them. A declaratory ruling directing all RBOCs either to refund new services overcharges to PSPs back to April 15, 1997 or to refund DAC to interexchange carriers ("IXC") is the best mechanism to achieve this result.

I. THE TELECOMMUNICATIONS ACT PREEMPTS STATE COMMISSIONS LIKE THE ILLINOIS COMMERCE COMMISSION FROM BARRING FCC-REQUIRED REFUNDS BASED ON STATE LAW

In 1997, the FCC issued an order mandating that that local exchange carriers ("LECs") such as RBOCs that relied on a waiver of certain tariff filing requirements must refund PSPs for overcharges where their rates filed in compliance with the new services test exceed their old, noncompliant rates:

> A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariff.

See Order, 12 FCC Rcd 21,370 at ¶ 25 (1997) ("1997 Refund Order")(emphasis added).

Based on the 1997 Refund Order, the IPTA asked the Illinois Commerce Commission ("ICC") to hold that SBC Illinois and Verizon (which relied on the above waiver) charged PSPs payphone services rates above the new services test limit and that SBC Illinois and Verizon should refund the overcharges to the PSPs. See IPTA Petition at 11. The ICC issued an order in 2003 holding that SBC Illinois and Verizon illegally overcharged the PSPs but refused to award refunds to IPTA because it would be "contrary to Illinois law" to order refunds, given that Illinois law prohibits refunds where rates have already been reviewed and approved by the

ICC. Interim Order, Docket No. 98-0195 at 43 (Nov. 12, 2003)("ICC Order"); see IPTA Petition at 6. This is known as the prohibition against "retroactive ratemaking" or the "filed rate doctrine."

The Telecommunications Act and related FCC orders preempt the ICC Order's holding that the ICC could not order refunds under Illinois state law. Section 276 of the Telecommunications Act states that FCC regulations preempt contrary state law:

> [T]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c); Memorandum Opinion and Order, 17 FCC Rcd 2,051 at ¶ 7 (2002) ("New Services Order"). Pursuant to this section, the FCC held that any state regulation that prevents the implementation of cost based rates in compliance with the new services test, effective no later than April 15, 1997, was inconsistent with the federal law and preempted. Report and Order, 11 FCC Rcd 20,541 at ¶ 147 (1996)("1996 Report and Order"). The FCC's new services test requirements developed in its payphone orders were "implemented pursuant to section 276(b)(1) and would fall within the scope of the preemption provision." New Services Order at ¶ 38. So, if the ICC concluded that the FCC's refund mandate based on the new services test was contrary to Illinois law, then the FCC's mandate preempts Illinois law, not the other way around.

The ICC argues that the U.S. Supreme Court's decision in Arizona Grocery Co. v. Atchison, 284 U.S. 370 (1932) also prohibits the ICC from awarding refunds, but Arizona Grocery involved different facts. In that case, the Supreme Court prohibited the Interstate Commerce Commission, a federal agency, from engaging in retroactive ratemaking under federal

law based on federally-filed tariffs. Id. at 381, 389. That is different from the Illinois Commerce Commission, a state agency, attempting to void an order of the FCC, a federal agency, based on state-filed tariffs. In sum, the Telecommunications Act and the FCC's orders preempt the Illinois law, and the FCC should so state in a declaratory ruling.

II. SBC ILLINOIS AND VERIZON ILLEGALLY COLLECTED DIAL AROUND COMPENSATION BECAUSE THEIR RATES VIOLATED THE NEW SERVICES TEST

In 1997 the FCC held that LECs, which includes RBOCs, cannot legally collect dial around compensation until they set their payphone services rates according to the new services test. LECs "will be eligible for [dial around] compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276:"

> To receive compensation a LEC must be able to certify the following: . . . it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphone); and . . . it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.

Order on Reconsideration, 11 FCC Rcd 21,233 at ¶ 131 (1997)(emphasis added). One of those requirements was that the intrastate tariffs described above must be set according to the "new services test required in the [1996] Report and Order [and] described at 47 C.F.R. § 61.49(g)(2)." Id. at ¶ 163 and n. 492. The FCC directed state commissions to determine whether RBOC rates met the new services test. Id. at ¶ 163.

The ICC Order concluded in November 2003 that "neither SBC's nor Verizon's existing rates are in compliance with the NST" or new services test. ICC Order at 46. Because SBC Illinois and Verizon's payphone rates did not comply with the new services test, SBC Illinois and Verizon could not legally collect dial around compensation. Yet SBC Illinois and

Verizon have collected "hundreds of millions of dollars" (Petition at 2) of dial around compensation anyway over the past several years. SBC Illinois and Verizon' self-certification in 1997 that their rates complied with the new services test provides no protection, as self-certification is no substitute for actual compliance as determined by state commissions.

Now that the ICC concluded that SBC Illinois and Verizon have not complied with the new services test, the FCC must issue a declaratory ruling stating that SBC Illinois and Verizon must either return the DAC to the IXCs who paid it or pay refunds for new services test overcharges to PSPs. If the FCC does not do so, it will effectively repeal a requirement established in a rulemaking without giving parties notice and an opportunity for comment, which the Administrative Procedure Act prohibits. 5 U.S.C. § 553(b).

III. CONCLUSION

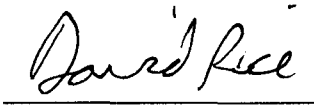
SBC Illinois and Verizon, as well as other RBOCs, for years illegally failed to set their payphone services rates according to the new services test, illegally failed to refund overcharges to PSPs when they finally filed compliant rates, and illegally collected dial around compensation the entire time. The FCC has emphasized that actual compliance with the new services test was required under the FCC's orders. As stated in IPTA's Petition, the ICC found that neither SBC nor Verizon were in actual compliance, yet the ICC still failed to enforce these federal requirements for the time period from April 15, 1997 through December 13, 2003. SBC and Verizon violated FCC orders both (1) through failing to provide rates in compliance with the new services test rates effective April 15, 1997, and (2) by collecting DAC without complying with the FCC's condition precedent for eligibility. The FCC imposed both requirements for the express purpose of ensuring that PSPs would receive cost-based rates no later than April 15, 1997. Illinois, and some other states, have failed to implement these requirements. Yet still

other states have implemented the FCC's orders and required refunds to PSPs. Enforcement of the same federal rights have ended in irreconcilably inconsistent results depending on in which state the PSP has payphones.

It is time for the FCC to end this game. A declaratory ruling like that described by IPTA is the best remedy. The FCC needs to address the uniform enforcement of its own orders by declaring that RBOCs must either refund to PSPs any rates in excess of the lawful rates or to return illegally collected DAC, and to order such other relief as the FCC deems appropriate.

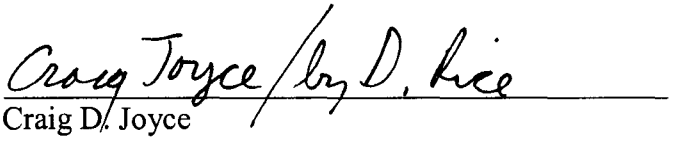
DATED this 26th day of August, 2004.

Respectfully submitted,



Brooks E. Harlow
David L. Rice
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101

Attorneys for the Northwest Public Communications Council



Craig D. Joyce
Walters & Joyce, P.C.
2015 York Street
Denver, CO 80205

Attorneys for the Colorado Payphone Association

Gregory Ludvigsen /by D. Rice

Gregory Ludvigsen
Ludvigsen's Law Offices
1360 University Ave. West
St. Paul, MN 55104-4086

Attorneys for the Minnesota Independent Payphone Association

CERTIFICATE OF SERVICE

FCC Docket No. 96-128

I hereby certify that a true and correct copy of the Comments of the Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association In Support of Petition for a Declaratory Ruling has been sent electronically and by first-class U.S. Mail to the following:

Michael W. Ward
Michael W. Ward, P.C.
1608 Barclay Blvd.
Buffalo Grove, Illinois 60089
E-mail: mwward@dnsys.com

DATED this 26th day of August, 2004.

Carol Munnerlyn, Secretary